TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, ET AL., ETC., PETITIONERS,

vs.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1952
CERTIORARI GRANTED DECEMBER 15, 1952

SUPREME COURT OF THE UNITED STATES

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INDEX

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civ. 50-68

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD G. DOERLE and HERBERT R. JOHNSON, doing business under the firm name and style of Orvis Brothers & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York, Plaintiffs-Appellees,

AGAINST

J. HOWARD MCGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, Defendant-Appellant,

AND

W. A. JULIAN, Treasurer of the United States, Defendant

STATEMENT UNDER RULE XV

This action was commenced by the filing of a complaint on April 28, 1949. The original plaintiffs are those set forth in the caption hereof. By stipulation marked "so ordered" on October 7, 1949 the defendant, J. Howard McGrath, was substituted in place and stead of Tom C. Clark, former Attorney General of the United States.

[fol. 2] Pursuant to order entered herein February 19, 1951, the plaintiffs filed their supplemental complaint on February 26, 1951. The answer of the defendants to the original and supplemental complaints was filed on March 16, 1951. Defendants' notice of issue on their motion for judgment on the pleadings was filed on May 28, 1951. Plaintiffs' notice of issue on their cross-motion for summary judgment was filed on June 13, 1951.

Defendants were not arrested, no bail was taken and no property was attached or arrested.

The cause came on for hearing on June 19, 1951 before the Honorable Sidney Sugarman, District Judge, United States District Court for the Southern District of New

York. The Court denied the defendants' motion for judgment on the pleadings and granted the plaintiffs' motion for summary judgment. No written opinion was filed by the Court.

Final order and judgment was entered on November 1, 1951 granting plaintiffs' motion for summary judgment and denying defendants' motion for judgment on the pleadings. Defendant, J. Howard McGrath, filed notice of appeal from said final order and judgment on December 17, 1951.

[fol. 3] IN UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD G. DOERLE and HERBERT R. JOHNSON, doing business under the firm name and style of Orvis Brothers & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York, Plaintiffs,

AGAINST

TOM C. CLARK, Attorney General of the United States, as Successor to the Alien Property Custodian, and W. A. JULIAN, Treasurer of the United States, Defendants

COMPLAINT—Filed April 28, 1949

Plaintiffs, by Baer & Marks, their attorneys, for their complaint, allege as follows:

1. Plaintiffs Warner D. Orvis, Homer W. Orvis, Floyd Y. Keeler, F. Howard Smith, Harold A. Rousselot, Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton, Clifford G. Doerle and Herbert R. Johnson are partners, doing business under the firm name and style of Orvis Brothers & Co. (hereinafter called "Orvis") as securities and commodities brokers with their principal office and place of business at No. 14 Wall Street, in the City, County [fol. 4] and State of New York. Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton and Clifford G.

Doerle became partners of Orvis on and after January 1st, 1946 and have no interest in any recovery herein.

2. Plaintiff, John J. McCloskey, Jr., was at all times hereinafter mentioned and now is the City Sheriff of the City of New York.

3. Plaintiffs, and each of them, are nationals of the United States, and not enemies or allies of enemies.

4. This action arises under Section 9 of the Trading with the Enemy Act (U. S. Code, Title 50, Section 24), being an action for the establishment of plaintiffs' interest in property vested by the Alien Property Custodian and taken into his possession and for the return to plaintiffs of so much of said property as will satisfy plaintiffs' claim.

5. Upon information and belief, at all times mentioned herein, Anderson Clayton & Co. (hereinafter called "Acco"), was and now is a joint stock association organized and existing under the laws of the State of Texas, and duly qualified and licensed to do business in the State of New York, and maintains an office at 60 Beaver Street, in the City, County and State of New York.

6. Heretofore and on or about June 25, 1943, Orvis commenced an action in the Supreme Court of the State of New York, County of New York, against C. Itoh & Co., Ltd., Takenosuke Itoh and Sanko Kabusiki Kaisya (hereinafter called "Sanko"), to recover a sum of money, to wit: $19,796.85 and interest, against said defendants, said sum [fol. 5] being the balance due from said defendants to Orvis, as a result of transactions more specifically set forth in the complaint in said action. In said action a warrant of attachment in the usual form was duly granted and issued by the Honorable Morris Eder, one of the Justices of said Court, on or about June 25, 1943, by virtue of the fact that the defendants in said action were each non-residents of the State of New York, and residents and nationals of the Empire of Japan. Said warrant of attachment was directed to the City Sheriff of the City of New York, one of the plaintiffs in this action, and to the Sheriff of any County of the State of New York, and commanded said Sheriff to attach and safely keep so much of the property within the County of such Sheriff which the defendants in said action, or any of them, may have at any time before

final judgment in said action as would satisfy the plaintiffs' demand, together with costs and expenses.

7. On information and belief, prior to the commencement of said action, defendant Sanko succeeded to all of the assets and liabilities of defendant C. Itoh & Co. Ltd. and particularly, defendant Sanko assumed and took over all of the obligations of C. Itoh & Co. Ltd. to Orvis.

8. On or about June 28, 1943, John J. McCloskey, Jr., as City Sheriff of the City of New York, by virtue of and pursuant to the command of the aforesaid warrant of attachment duly levied upon property of Sanko within the County of New York, by serving upon Acco at its office at No. 60 Beaver Street, in the City, County and State of New York, a copy of said warrant of attachment duly certified by said Sheriff with notice of property attached [fol. 6] and demand for certificate pursuant to the Civil Practice Act. On or about June 28, 1943, two duplicate copies of said warrant of attachment were served by the Sheriff of Albany County upon the Secretary of State of the State of New York for and on behalf of Acco as the designated agent of said company, to receive service of process within the State of New York. Under the laws of the State of New York, the aforesaid service of process constituted a valid levy upon all of the property, both tangible and intangible, of Sanko in the possession, custody or control of Acco, including all indebtedness of Acco to Sanko existing as of June 28th, 1943, and Orvis thereby secured a valid and enforceable lien thereon.

9. Thereafter on or about August 3, 1943, plaintiffs were informed by the testimony of Acco on examination in aid of attachment, held pursuant to an order of the Honorable Benjamin F. Schreiber, one of the Justices of the Supreme Court of the State of New York, that at the time of said levy there was on the books of Acco an indebtedness to said Sanko in the sum of $5,975.07, which indebtedness arose out of sales of merchandise. Said indebtedness was shown on the books of Acco in an account carried in the name of Sanko.

10. On or about August 19, 1943, an order was duly granted by the Honorable William C. Hecht, Jr., one of the Justices of the Supreme Court of the State of New York,

County of New York, granting permission to Orvis to institute and maintain in the name of themselves and the City Sheriff of the City of New York jointly, any actions or proceedings which by the provisions of the Civil Prac-
[fol. 7] tice Act may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff pursuant to the warrant of attachment above referred to.

11. On or about the 7th day of September, 1943 an action was commenced in aid of attachment pursuant to said order of August 19, 1943 to recover the sum of $5,975.07 with interest and costs. Said action in aid of attachment resulted in a judgment entered in the office of the Clerk of the County of New York on October 28, 19[illegible] in favor of the plaintiffs Orvis and John J. McCloskey, Jr., as City Sheriff of the City of New York and against the defendant Acco in the sum of $5,136.09, an offset in the sum of $874.48 having been allowed to defendant Acco against the indebtedness of $5,975.07 due to Sanko from Acco. Said judgment provided that plaintiffs should have execution therefor, provided that plaintiffs procure, prior to execution, such license as may be required by Executive Orders Nos. 8389 and 9193 as amended, authorizing defendant Acco to make payment. On or about November 20, 1946, plaintiffs filed with the Foreign Funds Control of the Treasury Department a formal application for a license to permit defendant Acco to make said payment to the Sheriff of the City of New York, in accordance with the terms of said judgment, but said application was denied on February 15th, 1947 for the reason that the consent of the Office of Alien Property, Department of Justice, was refused.

12. On or about June 27, 1947, the Office of Alien Property of the Department of Justice made an order desig-
[fol. 8] nated Vesting Order 9282 purporting to vest in the Attorney General of the United States the said debt owed to Sanko by Acco in the sum of $5,101.00, said sum representing the same indebtedness more particularly described in paragraph 9 hereof.

13. On or about July 18, 1947 pursuant to the provisions of the said Vesting Order 9282, Acco paid over to the Office

of Alien Property of the Department of Justice said sum of $5,100.59, and on information and belief, said sum is now held by defendant Tom C. Clark as Attorney General of the United States or by defendant W. A. Julian as Treasurer of the United States.

14. In the month of August, 1947, plaintiff Orvis was informed that on and prior to June 28, 1943, the date of the levy alleged in paragraph "8" herein, Acco was indebted to the said Sanko in the additional sum of $24,532.65, which indebtedness, upon information and belief, arose out of sales of merchandise, and that said indebtedness of $24,532.65 was due to said Sanko, in addition to the indebtedness of $5,975.07 alleged to have been due, in paragraph "9" herein.

15. Upon information and belief, on June 28, 1943, Acco was indebted to Sanko in said additional sum of $24,532.65 and there was no valid demand or offset of Acco against said indebtedness and said debt was due and payable by Acco to Sanko, and became subject to the lien of the levy made as more fully set forth in paragraph "8" hereof.

16. On or about July 18th, 1947, Acco paid over to the Office of Alien Property of the Department of Justice an [fol. 9] additional sum of $24,532.65 described as a pre-war balance of indebtedness of Acco to Sanko according to the Shanghai Branch books of Acco which had been transferred to Acco's head office in January, 1947. Said payment was made by Acco to the Office of Alien Property purportedly in accordance with Vesting Order No. 9282, which vesting order, however, did not purport to cover said balance of indebtedness of Acco to Sanko.

17. On or about November 25th, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 10253, purporting to vest in the Attorney General of the United States cash in the amount of $24,532.65 then in the custody of the Attorney General of the United States in Account No. 39-21693, which monies had been paid by Acco to said Office of Alien Property on July 18, 1947 in purported compliance with Vesting Order No. 9282.

18. On or about February 20, 1948, an order was duly granted by Honorable Ferdinand Pecora, one of the Jus-

tices of the Supreme Court of the State of New York, County of New York, directing the Clerk of the County of New York to amend nunc pro tunc the judgment in favor of the plaintiff and against Acco entered October 28, 1946 by increasing the amount thereof from $5,136.09 to $29,633.24 and thereafter said judgment was duly amended nunc pro tunc as of October 28th, 1946 to provide that plaintiffs should recover of Acco the sum of $29,633.24 to be applied in satisfaction of the judgment entered in the Office of the Clerk of the County of New York on December 3, 1943 in favor of plaintiffs against Sanko in the [fol. 10] sum of $20,714.84 and interest together with Sheriff's fees and the costs and disbursements of the action against Acco theretofore taxed in the sum of $35.50.

19. Said judgment entered October 28th, 1946 as so amended nunc pro tunc remains wholly unpaid and plaintiffs have not received any monies on account thereof or on account of the judgment against Sanko entered in the Office of the Clerk of the County of New York on December 3, 1943 as above set forth.

20. On or about the 28th day of April, 1949, an order was duly granted by the Honorable John E. McGeehan, one of the Justices of the Supreme Court of the State of New York, County of New York, granting permission to Orvis to institute and maintain in its own name and in the name of the Sheriff of the City of New York, jointly, any actions or proceedings which by the provisions of the Civil Practice Act, may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff, pursuant to the warrant of attachment above referred to. This action is instituted and maintained by plaintiffs pursuant to the provisions of said order.

21. On or about February 28, 1947, plaintiff Orvis filed a Notice of Claim with the Alien Property Custodian designated Claim No. 2022. Thereafter, the duties and obligations of the Alien Property Custodian were transferred to the Office of Alien Property of the Department of Justice.

22. Thereafter, the Office of Alien Property considered the claim filed by plaintiffs and, pursuant to its rules of

[fol. 11] procedure, treated said claim as an application for a retroactive license under Executive Order 8339 as amended, and on or about February 15th, 1949, made an order denying the application of plaintiffs for a retroactive license under Section 5(b) of the Trading with the Enemy Act.

23. By reason of said action of the Office of Alien Property in denying plaintiffs' application for a retroactive license, plaintiffs have been effectively denied their rights as attachment creditors under the laws of the State of New York, and the validity of plaintiffs' attachment lien under said laws has been impaired, prejudiced and destroyed.

24. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted payment to be made from assets of alien enemies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment, and by reason of the refusal, plaintiffs have been deprived of the equal protection of the laws in derogation of their constitutional rights.

25. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted to be paid to unlicensed attachment creditors assets of enemy aliens which should have been marshalled for the payment of claims including that of plaintiffs, and by reason of the refusal to grant a license in this case, plaintiffs have been deprived of property without due process of law in derogation of their constitutional rights.

[fol. 12] 26. Upon information and belief, no interest of the United States of America is involved in the administration and distribution of the assets of Sanko vested or held by the Office of Alien Property, and the action of the Office of Alien Property, in denying plaintiffs' application for a retroactive license, is, in effect, the exercise of judicial power in excess of the authority and power of the Office of Alien Property and the Executive Branch of the Government.

27. By reason of the premises, plaintiffs have been de-

prived of a preference in the distribution of the assets of Sanko vested or held by the Office of Alien Property, and have been damaged in an amount which cannot be stated at the present time.

WHEREFORE, plaintiffs pray that this Court adjudge and decree:

1. That the plaintiffs herein acquired a lien upon the entire indebtedness of Acco to Sanko on June 28, 1943 prior and superior to that of the defendants, or either of them;

2. That the defendants, or either or them, hold the sum of $29,633.24 subject and subordinate to the attachment lien of the plaintiffs herein;

3. That Vesting Orders 9282 and 10253 are valid and effective only to the extent of any surplus of the property so vested after application thereof to the extent of plaintiffs' lien thereon in satisfaction of plaintiffs' claim.

[fol. 13] 4. That the defendants, or either of them, be directed to pay to the Sheriff of the City of New York such part of said sum of $29,633.24 as shall be necessary to satisfy the judgment obtained by plaintiffs against Sanko Kabusiki Kaisya and entered in the Office of the Clerk of the County of New York on December 3rd, 1943, together with interest thereon from said date, and the Sheriff's fees, and costs amounting to $35.50 taxed in the action against Anderson Clayton & Co.

5. That such payment to the Sheriff of the City of New York be applied to the satisfaction of the claim of plaintiffs, Sheriff's fees, and costs.

6. That plaintiffs be awarded such other and further relief as to the court may seem just and proper.

Baer & Marks, By (Signed) Donald Marks, Member of the Firm, Attorneys for Plaintiffs, Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 14] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER OF SUBSTITUTION—October 7, 1949

J. Howard McGrath having succeeded Tom C. Clark as Attorney General of the United States, it is hereby

Stipulated and agreed by and between the respective parties herein that J. Howard McGrath, Attorney General of the United States, as Successor to the Alien Property Custodian of the United States, be substituted as defendant in this action in the place and stead of Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, and that the title of this action be deemed amended accordingly.

John F. X. McGohey, United States Attorney; Attorney for Defendants. Baer & Marks, Attorneys for Plaintiffs.

So Ordered. Wm. Bondy, U. S. D. J.

[fol. 15] IN UNITED STATES DISTRICT COURT

CROSS-ORDER GRANTING PLAINTIFF'S PERMISSION TO FILE SUPPLEMENTAL COMPLAINT—Filed February 19, 1951

Plaintiffs having moved this Court for an order permitting plaintiffs to serve a supplemental complaint in the form annexed to the notice of motion, and said motion having regularly come on to be heard on December 16, 1950.

Now, on reading and filing plaintiff's notice of motion dated November 28, 1950, the affidavit of Donald Marks, sworn to November 28, 1950, and the proposed supplemental complaint annexed to said notice of motion, with proof of due service thereof, and upon the complaint and all prior proceedings had herein, in support of the said motion, and after hearing Baer & Marks (Arthur M. Bullowa, of counsel), attorneys for plaintiffs, in support of the motion, and Irving H. Saypol, United States Attorney, (Leon Yudkin, of counsel), in opposition thereto, and due deliberation having been had thereon, and the decision of the Court having been filed, it is

Ordered, that plaintiffs' motion be and the same hereby is in all respects granted; and it is further

Ordered, that plaintiffs be and hereby are granted permission to file and serve a supplemental complaint in the form annexed to the notice of motion; and it is further

[fol. 16] Ordered that the defendants are hereby given twenty days from the date of service of the said supplemental complaint upon the defendants within which to answer the original and supplemental complaint.

Dated: New York, N. Y., February 13, 1951.

Sidney Sugarman, United States District Judge.

[fol. 17] In United States District Court

Supplemental Complaint

Plaintiffs, by Baer & Marks, their attorneys, for their supplemental complaint, allege as follows:

1. Plaintiffs Warner D. Orvis, Homer W. Orvis, Floyd Y. Keeler, F. Howard Smith, Harold A. Rousselot, Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton, Clifford G. Doerle and Herbert R. Johnson are partners, doing business under the firm name and style of Orvis Brothers & Co. (hereinafter called "Orvis") as securities and commodities brokers with their principal office and place of business at No. 14 Wall Street, in the City, County and State of New York, Henry H. Balfour, J. Antonio Zalduondo, William G. Wigton and Clifford G. Doerle became partners of Orvis on and after January 1st, 1946 and have no interest in any recovery herein.

2. Plaintiff, John J. McCloskey, Jr., was at all times hereinafter mentioned and now is the City Sheriff of the City of New York.

3. Plaintiffs, and each of them, are nationals of the United States and not enemies or allies of enemies.

4. This action arises under Section 9 of the Trading with the Enemy Act (U. S. Code, Title 50, Section 24), [fol. 18] being an action for the establishment of plaintiff's interest in property vested by the Alien Property Custodian and taken into his possession and for the return

to plaintiffs of so much of said property as will satisfy plaintiffs' claim.

5. Upon information and belief, at all times mentioned herein, Anderson Clayton & Co. (hereinafter called "Acco"), was and now is a joint stock association, organized and existing under the laws of the State of Texas, and duly qualified and licensed to do business in the State of New York, and maintains an office at 60 Beaver Street, in the City, County and State of New York.

6. Heretofore and on or about June 25, 1943, Orvis commenced an action in the Supreme Court of the State of New York, County of New York, against C. Itoh & Co. Ltd., Takenosuke Itoh and Sanko Kabusiki Kaisya (hereinafter called "Sanko"), to recover a sum of money, to wit: $19,796.85 and interest, against said defendants, said sum being the balance due from said defendants to Orvis, as a result of transactions more specifically set forth in the complaint in said action. In said action a warrant of attachment in the usual form was duly granted and issued by the Honorable Morris Eder, one of the Justices of said Court, on or about June 25, 1943, by virtue of the fact that the defendants in said action were each non-residents of the State of New York, and residents and nationals of the Empire of Japan. Said warrant of attachment was directed to the City Sheriff of the City of New York, one of the plaintiffs in this action, and to the Sheriff of any County of the State of New York, and commanded said [fol. 19] Sheriff to attach and safely keep so much of the property within the County of such Sheriff which the defendants in said action, or any of them, may have at any time before final judgment in said action as would satisfy the plaintiffs' demand, together with costs and expenses.

7. On information and belief, prior to the commencement of said action, defendant Sanko succeeded to all of the assets and liabilities of defendant C. Itoh & Co. Ltd. and particularly, defendant Sanko assumed and took over all of the obligations of C. Itoh & Co. Ltd. to Orvis.

8. On or about June 28, 1943, John J. McCloskey, Jr., as City Sheriff of the City of New York, by virtue of and pursuant to the command of the aforesaid warrant of attachment duly levied upon property of Sanko within the

County of New York, by serving upon Acco at its office at No. 60 Beaver Street, in the City, County and State of New York, a copy of said warrant of attachment duly certified by said Sheriff with notice of property attached and demand for certificate pursuant to the Civil Practice Act. On or about June 28th, 1943, two duplicate copies of said warrant of attachment were served by the Sheriff of Albany County upon the Secretary of State of the State of New York for and on behalf of Acco as the designated agent of said company, to receive service of process within the State of New York. Under the laws of the State of New York, the aforesaid service of process constituted a valid levy upon all of the property, both tangible and intangible, of Sanko in the possession, custody or control of Acco, including all indebtedness of Acco to Sanko existing as of June 28th, 1943, and Orvis thereby secured a valid and enforceable lien thereon.

[fol. 20] 9. Thereafter, on or about August 3, 1943, plaintiffs were informed by the testimony of Acco on examination in aid of attachment, held pursuant to an order of the Honorable Benjamin F. Schreiber, one of the Justices of the Supreme Court of the State of New York, that at the time of said levy there was on the books of Acco an indebtedness to said Sanko in the sum of $5,975.07, which indebtedness arose out of sales of merchandise. Said indebtedness was shown on the books of Acco in an account carried in the name of Sanko.

10. On or about August 19, 1943, an order was duly granted by the Honorable William C. Hecht, Jr., one of the Justices of the Supreme Court of the State of New York, County of New York, granting permission to Orvis to institute and maintain in the name of themselves and the City Sheriff of the City of New York jointly, any actions or proceedings which by the provisions of the Civil Practice Act may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff pursuant to the arrant of attachment above referred to.

11. On or about the 7th day of September, 1943, an action was commenced in aid of attachment pursuant to said order of August 19, 1943 to recover the sum of $5,975.07

with interest and costs. Said action in aid of attachment resulted in a judgment entered in the office of the Clerk of the County of New York on October 28th, 1946 in favor of the plaintiffs Orvis and John J. McCloskey, Jr., as City Sheriff of the City of New York and against the defendant Acco in the sum of $5,136.09, an offset in the sum of $874.48 [fol. 21] having been allowed to defendant Acco against the indebtedness of $5,975.07 due to Sanko from Acco. Said judgment provided that plaintiffs should have execution therefor, provided that plaintiffs procure, prior to execution, such license as may be required by Executive Orders Nos. 8389 and 9193 as amended, authorizing defendant Acco to make payment. On or about November 20, 1946, plaintiffs filed with the Foreign Funds Control of the Treasury Department a formal application for a license to permit defendant Acco to make said payment to the Sheriff of the City of New York, in accordance with the terms of said judgment, but said application was denied on February 15th, 1947 for the reason that the consent of the Office of Alien Property, Department of Justice, was refused.

12. On or about June 27, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 9282 purporting to vest in the Attorney General of the United States the said debt owed to Sanko by Acco in the sum of $5,101.00, said sum representing the same indebtedness more particularly described in paragraph 9 hereof.

13. On or about July 18, 1947 pursuant to the provisions of the said Vesting Order 9282, Acco paid over to the Office of Alien Property of the Department of Justice said sum of $5100.59, and on information and belief, said sum is now held by defendant J. Howard McGrath, as Attorney General of the United States, or by defendant W. A. Julian as Treasurer of the United States.

14. In the month of August, 1947, plaintiff Orvis was informed that on and prior to June 28, 1943, the date of the [fol. 22] levy alleged in paragraph "8" herein, Acco was indebted to the said Sanko in the additional sum of $24,532.65, which indebtedness, upon information and belief, arose out of sales of merchandise, and that said indebtedness of $24,532.65 was due to said Sanko, in addition to the

indebtedness of $5,975.07 alleged to have been due in paragraph "9" herein.

15. Upon information and belief, on June 28, 1943, Acco was indebted to Sanko in said additional sum of $24,532.65 and there was no valid demand or offset of Acco against said indebtedness and said debt was due and payable by Acco to Sanko, and became subject to the lien of the levy made as more fully set forth in paragraph "8" hereof.

16. On or about July 18th, 1947, Acco paid over to the Office of Alien Property of the Department of Justice an additional sum of $24,532.65 described as a pre-war balance of indebtedness of Acco to Sanko according to the Shanghai Branch books of Acco which had been transferred to Acco's head office in January, 1947. Said payment was made by Acco to the Office of Alien Property purportedly in accordance with Vesting Order No. 9282, which vesting order, however, did not purport to cover said balance of indebtedness of Acco to Sanko.

17. On or about November 25th, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 10253, purporting to vest in the Attorney General of the United States cash in the amount of $24,532.65 then in the custody of the Attorney General of the United States in Account No. 39-21693, which monies [fol. 23] had been paid by Acco to said Office of Alien Property on July 18th, 1947 in purported compliance with Vesting Order No. 9282.

18. On or about February 20, 1948, an order was duly granted by Honorable Ferdinand Pecora, one of the Justices of the Supreme Court of the State of New York; County of New York, directing the Clerk of the County of New York to amend nunc pro tunc the judgment in favor of the plaintiffs and against Acco entered October 28, 1946 by increasing the amount thereof from $5,136.09 to $29,633.24 and thereafter said judgment was duly amended nunc pro tunc as of October 28th, 1946 to provide that plaintiffs should recover of Acco the sum of $29,633.24 to be applied in satisfaction of the judgment entered in the Office of the Clerk of the County of New York on December 3, 1943 in favor of plaintiffs against Sanko in the sum of $20,714.84 and interest together with Sheriff's fees and

the costs and disbursements of the action, against Acco theretofore taxed in the sum of $35.50.

19. Said judgment entered October 28, 1946 as so amended nunc pro tunc remains wholly unpaid and plaintiffs have not received any monies on account thereof or on account of the judgment against Sanko entered in the Office of the Clerk of the County of New York on December 3, 1943 as above set forth.

20. On or about the 28th day of April, 1949, an order was duly granted by the Honorable John E. McGeehan, one of the Justices of the Supreme Court of the State of New York, County of New York, granting permission to Orvis to institute and maintain in its own name and in the [fol. 24] name of the Sheriff of the City of New York, jointly, any actions or proceedings which by the provisions of the Civil Practice Act, may be brought by said Sheriff for the purpose of collecting and recovering the debts and things in action attached by said Sheriff, pursuant to the warrant of attachment above referred to. This action is instituted and maintained by plaintiffs pursuant to the provisions of said order.

21. On or about February 28, 1947, plaintiff Orvis filed a Notice of Claim with the Alien Property Custodian designated Claim No. 2022. Thereafter, the duties and obligations of the Alien Property Custodian were transferred to the Office of Alien Property of the Department of Justice.

22. Thereafter, the Office of Alien Property considered the claim filed by plaintiffs and, pursuant to its rules of procedure, treated said claim as an application for a retroactive license under Executive Order 8339 as amended, and on or about February 15th, 1949, made an order denying the application of plaintiffs for a retroactive license under Section 5(b) of the Trading with the Enemy Act.

23. Thereafter, on April 27th, 1949, a motion was made by the Chief of the Claims Branch of the Office of Alien Property to dismiss the claim filed by plaintiffs on the ground that it appeared from the notice of claim and the order of the Director denying the application for a retroactive license that the claimants were not, within the meaning of Section 32(a) of the Trading with the Enemy Act, as amended, the owners of the property or interest de-

scribed in the Notice of Claim immediately prior to its [fol. 25] vesting or transfer to the Alien Property Custodian, or the legal representatives, or successors in interest by inheritance, devise, bequest, or operation of law, of such owner. By an order dated June 23rd, 1949, the Hearing Examiner granted said motion and dismissed plaintiffs' claim to the extent that it was a title claim. Thereafter, on June 29th, 1949, plaintiffs filed a petition to review the decision of said Hearing Examiner, and the petition for review was granted by the Director of the Office of Alien Property by order dated October 10th, 1949, in which the review was limited to the effect of the unlicensed attachment. Thereafter, by an order dated October 19, 1950, the Director of the Office of Alien Property affirmed the decision of the Hearing Examiner.

24. By reason of said action of the Office of Alien Property in denying plaintiffs' application for a retroactive license and in dismissing plaintiffs' claim as a title claim, and by reason of the action of the Director of the Office of Alien Property affirming said dismissal, plaintiffs have been effectively denied their rights as attachment creditors under the laws of the State of New York, and the validity of plaintiffs' attachment lien under said laws has been impaired, prejudiced and destroyed.

25. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted payment to be made from assets of alien enemies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment, and by reason [fol. 26] of the refusal, plaintiffs have been deprived of the equal protection of the laws in derogation of their constitutional rights.

26. Upon information and belief, the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted to be paid to unlicensed attachment creditors assets of enemy aliens which should have been marshalled for the payment of claims including that of plaintiffs, and by reason of the refusal to grant a license in this case, plaintiffs have been deprived of prop-

erty without due process of law in derogation of their constitutional rights.

27. By reason of the actions taken within the office of Alien Property as above alleged, plaintiffs have exhausted their administrative remedies.

28. Upon information and belief, no interest of the United States of America is involved in the administration and distribution of the assets of Sanko vested or held by the Office of Alien Property, and the action of the Office of Alien Property, in denying plaintiffs' application for a retroactive license, is, in effect, the exercise of judicial power in excess of the authority and power of the office of Alien Property and the Executive Branch of the Government.

29. By reason of the premises, plaintiffs have been deprived of a preference in the distribution of the assets of Sanko vested or held by the Office of Alien Property, and have been damaged in an amount which cannot be stated at the present time.

[fol. 27] Wherefore, plaintiffs pray that this Court adjudge and decree:

1. That the plaintiffs herein acquired a lien upon the entire indebtedness of Acco to Sanko on June 28, 1943 prior and superior to that of the defendants, or either of them;

2. That the defendants, or either of them, hold the sum of $29,633.24 subject and subordinate to the attachment lien of the plaintiffs herein;

3. That Vesting Orders 9282 and 10283 are valid and effective only to the extent of any surplus of the property so vested after application thereof to the extent of plaintiffs' lien thereon in satisfaction of plaintiffs' claim.

4. That the defendants, or either of them, be directed to pay to the Sheriff of the City of New York such part of said sum of $29,633.24 as shall be necessary to satisfy the judgment obtained by plaintiffs against Sanko Kabusiki Kaisya and entered in the Office of the Clerk of the County of New York on December 3rd, 1943, together with interest thereon from said date, and the Sheriff's fees,

and costs amounting to $35.50 taxed in the action against Anderson Clayton & Co.

5. That such payment to the Sheriff of the City of New York be applied to the satisfaction of the claim of plaintiffs, Sheriff's fees, and costs.

[fol. 28] 6. That plaintiffs be awarded such other and further relief as to the court may seem just and proper.

Baer & Marks, by (Signed) Donald Marks, Member of the Firm, Attorneys for Plaintiffs, Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 29] IN UNITED STATES DISTRICT COURT

ANSWER

Defendants for their answer to the original and supplemental complaints as contained in the pleading denominated supplemental complaint;

1. Admits the allegations contained in paragraphs 2, 4, 6, 9, 10, 11, 12, 13, 16, 17, 18, 20, 22, 23, and 27.

2. Deny each and every allegation contained in paragraphs 24, 26, and 28.

3. Deny any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 3, 5, 14, and 19.

4. Admit the allegation in paragraph 7 that "prior to the commencement of said action, defendant Sanko succeeded to all of the assets and liabilities of defendant C. Itoh & Co., Ltd." and except as thus expressly admitted, deny any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in that paragraph.

5. Admit the allegations contained in the first two sentences of paragraph 8 except deny the allegation therein that the attachment was "duly levied," and, except as thus [fol. 30] expressly admitted and denied, deny each and every other allegation in that paragraph.

6. Admit the allegations contained in paragraph 15 that:

> On June 28, 1943, Acco was indebted to Sanko in said additional sum of $24,532.65 * * * and said debt was due and payable by Acco to Sanko, * * *

and except as thus expressly admitted, deny any knowledge or information sufficient to form a belief as to the truth of the allegation that "there was no valid demand or offset of Acco against said indebtedness," and deny each and every other allegation contained in that paragraph.

7. Admit the allegations contained in paragraph 21 that "plaintiff Orvis filed a Notice of Claim with the Office of Alien Property Custodian designated Claim No. 2022" and that "the duties and obligations of the Alien Property Custodian were transferred to the Office of Alien Property of the Department of Justice" and, except as thus expressly admitted, deny each and every other allegation in that paragraph.

8. Admit the allegation in paragraph 25 that:

> * * * the Office of Alien Property and its predecessor, the Alien Property Custodian, have caused or permitted payment to be made from assets of alien enmies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment. * * *

and, except as thus expressly admitted, deny each and every other allegation in that paragraph.

[fol. 31] 9. Admit that plaintiffs were not granted a preference in the distribution of the assets of Sanko vested by the Office of Alien Property, but deny that they have been deprived of such a preference, as alleged in paragraph 29, for the reason that plaintiffs have no right to such a preference, and, except as thus expressly admitted and denied, deny each and every other allegation in that paragraph.

Wherefore, defendants pray for judgment dismissing this action with costs.

Harold I. Baynton, Assistant Attorney General,
Irving R. Saypol, United States Attorney, Southern District of New York, United States Court

House, Foley Square, New York 7, New York, By Lawrence G. Greene, Assistant United States Attorney, James D. Hill, Daniel G. McGrath, Leon Yudkin, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for Defendants.

[fol. 32] In United States District Court

Notice of Motion by Defendants for Judgment of the Pleadings

Please take notice that the undersigned will move the Court at Room 506, United States Court House, Foley Square, New York, New York, on the 15th day of June, 1951, at 10:30 a. m., or as soon thereafter as counsel can be heard, to enter a judgment on the pleadings in favor of defendants herein on the ground that there is no issue as to any material fact and defendants are entitled to judgment as a matter of law.

Irving H. Saypol, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York, Attorney for Defendants.

[fol. 33] In United States District Court

Notice of Cross-Motion by Plaintiffs for Summary Judgment—June 4, 1951

Sir:

Please take notice that upon the annexed affidavit of F. Howard Smith, sworn to the 6th day of June, 1951, and upon the supplemental complaint and answer and all prior proceedings had herein, plaintiffs will make a cross-motion at a motion term of this Court to be held at the Courthouse thereof at Foley Square, Borough of Manhattan, City, State and County of New York, on the 15th day of June, 1951, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order pursuant to

Rule 56 of the Rules of Civil Procedure, granting plaintiffs summary judgment for the relief requested in the supplemental complaint and for such other, further and different relief as the Court may deem just and proper.

Dated: New York, June 4, 1951.

Baer, Marks, Friedman, Berliner & Klein, Attorneys for Plaintiffs, 20 Exchange Place, New York 5, N. Y.

[fol. 34] AFFIDAVIT OF F. HOWARD SMITH ANNEXED TO NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss.:

F. HOWARD SMITH, being duly sworn, deposes and says:

I am a partner of Orvis Brothers & Co. and am familiar with the facts upon which this action is based and the prior proceedings had herein.

I make this affidavit in support of a cross-motion for summary judgment on the ground that there is no genuine issue as to any material fact and the plaintiffs are entitled to judgment as a matter of law.

Orvis Brothers & Co., are securities and commodities brokers with a principal office and place of business at 14 Wall Street in the City of New York. All of the partners thereof are United States citizens, and none are, or ever have been, of enemy nationality.

Prior to April 18, 1934 C. Itoh & Co., Ltd. had an account with Orvis Brothers & Co. for the purchase and sale of cotton futures contracts on the New York Cotton Exchange. In or about the month of March 1934 Takenosuke Itoh was elected a member of the New York Cotton Exchange. Takenosuke Itoh and C. Itoh & Co. requested Orvis Broth-
[fol. 35] ers & Co. to open an account in the name of Takenosuke Itoh and to execute orders for the purchase and sale of cotton futures contracts on the New York Cotton Exchange for the account of Takenosuke Itoh. C. Itoh & Co. agreed, in consideration of Orvis Brothers & Co. opening this account and executing orders and carrying contracts in said account without the deposit of original mar-

gin, to guarantee to Orvis Brothers & Co. the payment of any monies which may become due to Orvis Brothers & Co. by Takenosuke Itoh. Said guarantee of C. Itoh & Co. was in writing, dated April 18, 1934 and subsequently another guarantee by C. Itoh & Co. was forwerded to Orvis Brothers & Co. under date of August 24, 1934.

Orvis Brothers & Co. executed orders for the purchase and sale of cotton futures contracts on the New York Cotton Exchange, deposited margins with the New York Cotton Clearing Association, paid variation margins on open contracts to said Clearing Association and paid losses on closed out contracts, all in connection with the purchase and sale of cotton futures contracts for the account of Takenosuke Itoh. All of said orders were taken and deposits made and losses paid in reliance upon the guarantee of C. Itoh & Co., Ltd.

All of the open contracts carried in the account of Takenosuke Itoh were closed out in March 1938 and the balance due to Orvis Brothers & Co. on March 31, 1938 was $43,341.37.

On January 10, 1940 Takenosuke Itoh wrote to Orvis Brothers & Co., acknowledging the indebtedness and promising to liquidate the same at the earliest possible opportunity. Because of Japanese Government restrictions it was not possible to liquidate the balance due at that time. [fol. 36] Thereafter, remittances from Takenosuke Itoh and C. Itoh & Co., Ltd. and collections effected by Orvis Brothers & Co. reduced the balance due to Orvis Brothers & Co. to $19,796.85.

Sanko Kabusiki Kaisya, hereinafter referred to as "Sanko", is a Japanese corporation which formed an amalgamation with, and assumed all of the obligations of C. Itoh & Co., Ltd. Orvis Brothers & Co. were so advised by cable dated November 8, 1941. The cablegram was afterwards confirmed by a printed communication.

Orvis Brothers & Co. commenced an action to recover the sum then due in this account by procuring a warrant dated June 25, 1943. At the date of the application for said warrant the indebtedness in the account of Takenosuke Itoh with Orvis Brothers & Co., which indebtedness was

guaranteed by C. Itoh & Co. and its successor, Sanko, was in the amount of $19,796.85 with interest from May 1, 1943.

All subsequent proceedings herein set forth are based upon the warrant of attachment dated June 25, 1943.

A levy was made under said warrant of attachment on June 28, 1943 upon funds of the defendant Sanko in the possession of Anderson, Clayton & Co. Anderson, Clayton & Co. is a joint stock association organized under the laws of Texas and licensed to do business in New York. Anderson, Clayton & Co. maintain an office in New York City at 60 Beaver Street. On or about June 28, 1943 two duplicate copies of the warrant were served upon the Secretary of State of the State of New York, as the designated agent of Anderson, Clayton & Co. to receive service of process.

Orvis Brothers & Co. were informed, and an examination in aid of attachment disclosed, that there was on the books of Anderson, Clayton & Co. an indebtedness to Sanko in [fol. 37] the sum of $5,975.07. The testimony of an officer of Anderson, Clayton & Co. on examination in aid of attachment disclosed that said sum of $5,975.07 represented a debt due to Sanko on the books of Anderson, Clayton & Co. in Houston, Texas. An offset of $874.48 was claimed by Anderson, Clayton & Co. Said offset represented a debt due by Sanko to Anderson, Clayton & Co. arising from transactions in Bombay, India.

The action in aid of attachment resulted in the entry of a judgment in favor of Orvis Brothers & Co. and the Sheriff of the City of New York against Anderson, Clayton & Co. in the sum of $5,136.09 on October 28, 1946. Said sum was arrived at after allowing to Anderson, Clayton & Co. the offset in the sum of $874.48.

On December 3, 1943 judgment was entered in favor of Orvis Brothers & Co. against Sanko in the sum of $20,714.84.

The judgment entered in the action in aid of attachment provided that plaintiffs should have execution therefor if a license were obtained to effect compliance with Executive Orders Nos. 8389 and 9193 as amended.

Application for a license to authorize Anderson, Clayton & Co. to make payment was denied on February 15, 1947 for the reason that the consent of the Office of Alien Property of the Department of Justice was refused.

On June 27, 1947 the Office of Alien Property made an

order designated Vesting Order 9282, purporting to vest in the Attorney-General of the United States the debt owed to Sanko by Anderson, Clayton & Co. in the sum of $5,101.00. On July 18, 1947 the sum of $5,100.59 was paid over by Anderson, Clayton & Co. to the Office of Alien Property in compliance with said vesting order.

[fol. 38] In August 1947 Orvis Brothers & Co. learned that on June 28, 1943, the date of the levy on Anderson, Clayton & Co., the said Anderson, Clayton & Co. was indebted to Sanko in the additional sum of $24,532.65. Anderson, Clayton & Co. forwarded said additional sum to the Office of Alien Property with a letter dated July 18, 1947 which describes said additional sum as a "pre-war balance per our Shanghai branch books, transferred to head Office in January 1947." A copy of said letter is annexed hereto and marked Exhibit A. Thereafter, on November 25, 1947, the Office of Alien Property of the Department of Justice made an order designated Vesting Order 10253, purporting to vest in the Attorney-General of the United States said sum of $24,532.65 then in the custody of the Attorney-General of the United States.

On February 17, 1948 Orvis Brothers & Co. and the Sheriff of the City of New York obtained an order to show cause directed to Anderson, Clayton & Co. requiring said Anderson, Clayton & Co. to show why an order should not be made amending the amount of the judgment made and entered on October 28, 1946 to conform to the facts subsequently discovered with respect to the balance due from Anderson, Clayton & Co. to Sanko on June 28, 1943. The papers upon which said order was granted included a stipulation between the attorneys for Orvis Brothers & Co. and the Sheriff of the City of New York and the attorneys for Anderson, Clayton & Co., setting forth the newly discovered facts with respect to said net balance in favor of Sanko in the sum of $24,332.65. A copy of said stipulation is annexed hereto and marked Exhibit B.

On or about February 20, 1948 an order was made in said action in aid of attachment directing the Clerk of [fol. 39] the County of New York to amend nunc pro tunc the judgment in favor of plaintiffs and against Anderson, Clayton & Co. entered October 28, 1946 by increasing the

amount thereof from $5,136.09 to $29,633.24 and thereafter said judgment was duly amended nunc pro tunc as of October 28, 1946 to provide that plaintiffs should recover of Anderson, Clayton & Co. the sum of $29,633.24 to be applied in satisfaction of the judgment entered in the Office of the Clerk of New York County on December 3, 1943 in favor of Orvis Brothers & Co. against Sanko in the sum of $20,714.84 with interest and Sheriff's fees and costs and disbursements.

Said judgment, entered on October 28, 1946 as so amended nunc pro tunc, and the judgment entered on December 3, 1943 in favor of Orvis Brothers & Co. and against Sanko have not been paid. Orvis Brothers & Co. have not received any monies on account thereof.

On April 28, 1949 Orvis Brothers & Co. obtained permission by an order of the Supreme Court of the State of New York to institute and maintain in their own name and in the name of the Sheriff of the City of New York any actions or proceedings which may be brought for the purpose of collecting and recovering debts attached by the Sheriff pursuant to the warrant of attachment referred to above. This action under Section 9 of the Trading with the Enemy Act was commenced pursuant to said order to establish the right of Orvis Brothers & Co. to a preference in the liquidation of property of Sanko vested by the Alien Property Custodian.

On February 28, 1947 Orvis Brothers & Co. filed a notice of claim with the Alien Property Custodian and thereafter pursued the remedies available within the Office of [fol. 40] Alien Property. The Office of Alien Property considered the claim filed by Orvis Brothers & Co. and treated it as an application for a retroactive license under Executive Order 8389, as amended, and denied said application. Subsequently, the Chief of the Claims Branch of the Office of Alien Property moved to dismiss the claim filed by plaintiff Orvis Brothers & Co. Said motion was thereafter granted by a Hearing Examiner of the Office of Alien Property. On appeal from the order granting the motion the Director of the Office of Alien Property affirmed the decision of the Hearing Examiner.

On May 15, 1951, plaintiffs requested defendants to answer certain interrogatories pursuant to Rule 33 of the

Rules of Civil Procedure. The interrogatories were three in number, and read as follows:

1. Give the names of the estates of enemy aliens from the assets of which the Alien Property Custodian has caused or permitted payment to be made to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment; the names of the parties to whom such payments were made; the amount or amounts so paid; and the circumstances under which each payment was made and the time or times when the same were made.

2. State whether any payment has been made to an unlicensed attachment creditor in the United States out of assets which were in any way or to any extent subject to claims of creditors of Sanko Kabusiki Kaisya; give the name or names of the estates out of which such payments were made and the name or names of the parties to whom such payments were made; and state fully the circum-
[fol. 41] stances under which each such payment was made and the time when the same was made.

3. State whether any payment has been made to any creditor in the United States out of assets which were in any way or to any extent subject to claims of creditors of Sanko Kabusiki Kaisya; give the name or names of the estates out of which such payments were made and the name or names of the parties to whom such payments were made; and state fully the circumstances under which each such payment was made and the time when the same was made.

On May 25, 1951, defendants made a motion returnable on June 15 to strike the interrogatories and a further motion for judgment on the pleadings.

Plaintiffs requested defendant's counsel to adjourn the motion for judgment on the pleadings, so that the motion to strike the interrogatories could be disposed of first. The office of the United States Attorney refused to permit a prior disposition of the motion to strike the interrogatories and would only agree to an adjournment of both motions, or to a prior disposition of the motion for judgment on the pleadings.

Upon the argument of this motion, plaintiffs will make application to the Court for a prior disposition of the motion to strike the interrogatories, as the information sought in the interrogatories may serve to furnish an additional basis for awarding summary judgment to plaintiffs. The supplemental complaint alleges in Paragraph 25 that the Office of Alien Property has caused payments to be made to attachment creditors from assets of alien enemies, without the necessity of a license by the Treasury [fol. 42] Department prior to attachment. By reason of the refusal to make a payment in this case plaintiffs have been deprived of the equal protection of the laws. Plaintiffs seek by their interrogatories to obtain further details of such payments in order to establish more fully their right to relief based upon constitutional grounds.

It would therefore appear that plaintiffs' right to obtain answers to the interrogatories should be determined first. Neither defendant's motion for judgment on the pleadings, nor plaintiffs' cross-motion for summary judgment should be decided until after plaintiffs' right to obtain the information sought in the interrogatories has been determined.

Plaintiffs claim the right to summary judgment by virtue of the attachment lien irrespective of the answers to be made to the interrogatories. Plaintiffs' right to summary judgment because of the priority to which plaintiffs are entitled under the attachment lien would not be effected by the answer to the interrogatories.

By reason of the facts hereinabove set forth, Orvis Brothers & Co. believe that, both under the law of New York and the Federal law, they are entitled to the status of preferred creditors as a matter of law.

F. Howard Smith.

(Sworn to by F. Howard Smith June 6, 1951.)

[fol. 43] In United States District Court

Exhibit A Annexed to Notice of Cross-Motion for Summary Judgment.

July 18, 1947

Your File: WHM:WJR:AFW:rf, F-39-11-A-1, F-39-11-C-1, F-39-11-C-6, V. C. No. 9282.

Office of Alien Property
Department of Justice
Washington 25, D. C.

Attention Mr. David L. Bazelon, Assistant Attorney General Director, Office of Alien Property

Dear Sirs:

Reference is made to your letter of July 10, 1947, regarding debt owed by us to Sanko Kabusiki Kaisya (formerly C. Itoh & Co. Ltd.).

In accordance with Vesting Order No. 9282, we are enclosing our check No. 31116 drawn on The Union National Bank, Houston, Texas, for $29,633.24, covering the balance due Sanko Kabusiki Kaisya, Account No. 39-21693.

[fol. 44] This payment covers—

Balance to their credit December 31, 1945, as reported on Form APC 56, Series A (filed February 19, 1946)	$ 5,100.59
Pre-war balance per our Shanghai Branch books, transferred to head office in January 1947	24,532.65
	$29,633.24

Yours very truly, /s/ W. E. Parry, Controller.

WEP:EB.

bbc-Mr. W. L. A.

[fol. 45] IN UNITED STATES DISTRICT COURT

EXHIBIT B ANNEXED TO NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

WARNER D. ORVIS, HERBERT R. JOHNSON, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT a partnership doing business as ORVIS BROTHER & Co., and JOHN J. McCLOSKEY, JR., as City Sheriff of the City of New York, Plaintiffs,

AGAINST

ANDERSON CLAYTON & Co., Defendant

It is hereby stipulated by and between the parties in this action that the amount of $5,100.59 in the judgment entered herein on October 23, 1946 was computed in that sum instead of in the sum of approximately $29,633.24 as a result of the following facts and circumstances:

1. Said amount was intended to represent the amount of the balance in an open and running account between this defendant and one Sanko Kabusiki Kaisya (a Japanese Corporation, hereinafter called "Sanko") which could have been struck in favor of said Sanko on June 28, 1943, at which time a warrant of attachment against so much of the property of Sanko as would satisfy a demand by plaintiff [fol. 46] Orvis Brothers & Co. against Sanko of $19,796.85 together with the costs and expenses was served by plaintiff Sheriff on this defendant in New York County.

2. Prior to December 7, 1941, defendant transacted business on said open and running account with Sanko through defendant's principal office at Houston, Texas, and certain of defendant's branch offices and agencies outside the United States and more particularly through defendant's agencies at Osaka, Japan and Shanghai, China.

3. As a regular practice defendant recorded the results of transactions in said account as the same were reported to its principal office at Houston, Texas, in a ledger record kept at said office.

4. In the normal course of defendant's business its foreign agency and more particularly its agencies at Osaka, Japan and Shanghai, China, regularly reported transactions had by them to defendant's principal office at Houston, Texas by means of periodical abstracts or reports which were entered in the aforesaid ledger account at defendant's principal office at Houston, Texas.

5. Due to the outbreak of war between Japan and the United States and the interruption of the ordinary course of mail occasioned thereby, regular abstracts of business transacted by defendant's agencies at Osaka, Japan and Shanghai, China for the period between September 30, 1941 and December 7, 1941 failed to reach defendant's principal office at Houston, Texas and said office was left without any knowledge of such transactions until January 1947.

[fol. 47] 6. At the time of the service of the aforesaid warrant of attachment on June 28, 1943, the balance between entries in favor of Sanko and entries against Sanko in said ledger record at defendant's principal office at Houston, Texas amounted to $5,975.07 in favor of Sanko subject to reduction by reason of an item against Sanko in the sum of $874.48, thus making a net balance of $5,100.59 in favor of Sanko, subject to such items as might be entered in said ledger record when, as and if information reached defendant concerning other transactions between its agencies at Osaka, Japan and Shanghai, China and said Sanko.

7. On this basis, plaintiffs moved for and obtained the judgment entered herein on October 28, 1945, copy of which is annexed to the affidavit of Floyd Y. Keeler, sworn to February 13, 1948, and marked Exhibit B.

8. In fact, although at that time, unknown to either plaintiffs or defendant's principal office, defendant's former Shanghai Agency had had transactions prior to December 7, 1941 with Sanko resulting in an item in favor of Sanko in the sum of $24,532.65.

9. This fact was not known to either the plaintiffs, or to the defendant's principal office in Houston, Texas prior to the month of January, 1947.

10. In January 1947, defendant's principal office in Houston, Texas received the abstracts by mail from its Shanghai, China Agency and included in said abstracts was a net bal-

ance in favor of Sanko in the sum of $24,532.65 on account of transactions between Sanko and defendant's agency at Shanghai, China.

[fol. 48] 11. Said item if it had been known and entered in the aforesaid ledger account at defendant's principal office in Houston, Texas would have increased the balance. In the aforesaid open and running account which could have been struck in favor of Sanko at the time of the service of the aforesaid warrant of attachment on June 28, 1943 from $5,100.59 to $29,633.24.

Dated: New York, N. Y., February 17, 1948.

/s/ Baer and Marks, Attorneys for Plaintiffs,
/s/ Davis Polk Wardwell Sunderland & Kiendl,
Attorneys for Defendant.

[fol. 49] In United States District Court

Letter to Hon. Sidney Sugarman Dated July 26, 1951

(Letterhead of Baer, Marks, Friedman, Berliner & Klein, New York 6, N. Y.)

July 26, 1951

Hon. Sidney Sugarman, U. S. District Court House, Foley Square, New York, N. Y.

Re: Warner D. Orvis, et al. v. Howard McGrath, as Successor to the Alien Property Custodian, et al. Civil Action 50-68.

My dear Judge Sugarman:

We have submitted a proposed order and judgment in the above entitled matter in conformity with Your Honor's decisions of the motions in the above entitled action. The United States Attorney has submitted a proposed counter order and judgment which differs from our form of order and judgment in that it omits the phrase "together with interest thereon from said date, the Sheriff's poundage fees," from the third paragraph from the end of the order.

We know of no basis for the omission of interest and

Sheriff's poundage fees from the proposed judgment and we write this letter to urge that Your Honor sign the proposed order and judgment in the form submitted by us.

The judgment which plaintiff, Orvis Brothers & Co. obtained against the Japanese debtor was entered by the [fol. 50] County Clerk of New York County on December 3, 1943, in the sum of $20,714.84. There can be no question but that this judgment carries interest under the laws of New York State.

The judgment obtained by plaintiffs in the action in aid of attachment was entered by the County Clerk of New York County on October 28, 1946. It provides that the Sheriff shall apply the sum of $29,633.24 upon receipt by the Sheriff, to the satisfaction of the judgment for $20,714.84 and interest, Sheriff's fees and costs, and shall pay over any balance remaining in his hands to the Japanese debtor.

In The People of the State of New York (2d Russian Insurance Co.) 255 N. Y. 412, there is some discussion of the applicable rules with respect to the interest reached by a levy made under a warrant of attachment. Mr. Justice Cardozo stated:

> "The respondent takes the position that in the distribution of the surplus, interest is always limited to a period beginning with the date of the warrant of attachment, and can never include interest previously accruing. The appellant insists in opposition that the interest payable by the liquidator must include whatever interest is protected by the lien.
> Unquestionably the latter must be accepted as the proper rule."

[fol. 51] In view of the foregoing facts and authority we respectfully urge that Your Honor sign the order and judgment in the form submitted by plaintiffs.

Very truly yours, Baer, Marks, Friedman, Berliner & Klein, Arthur M. Bullowa.

AMB-mk

cc: Irving Saypol, United States Attorney, U. S. District Court House, Foley Square, New York.

[fol. 52] IN UNITED STATES DISTRICT COURT

LETTER TO BAER AND MARKS DATED JULY 30, 1951

(Letterhead of United States District Court,
Foley Square, New York.)

July 30th, 1951

Re: Orvis v. McGrath

Baer and Marks, Esqs.
20 Exchange Place
New York, New York

Att: Mr. Arthur Bullowa

Gentlemen:

Pursuant to telephone conversation had this morning with Mr. Bullowa, I forward herewith photostatic copy of letter from the Department of Justice addressed to Irving H. Saypol dated July 24, 1951 concerning the allowance of interest and Sheriff's fees in the judgment in the above case.

At the request of the United States Attorney, I have deleted from the copy certain paragraphs of a confidential nature which do not pertain in any way to the points of law involved.

Will you return the photostat with any reply you may wish to make.

Yours truly, /s/ Edward J. Ryan.

EJR/j

encl.

[fol. 53] EXTRACT FROM LETTER FROM DEPARTMENT OF JUSTICE DATED JULY 24, 1951

As discussed with Mr. Skolnik, there are two features of this order which we desire stricken. They are the two provisions in the last paragraph starting on page 2 of plaintiff's proposed order to the effect that the judgment filed in the office of the County Clerk of New York on December 3, 1943, in favor of the plaintiffs and against Sanko Kabusiki

Kaisya, which read ". . . together with interest thereon from said date, the Sheriff's poundage fees, . . ." shall be paid by the defendants. Citation of authorities in support of our objections will be set forth hereinafter.

We have, therefore, prepared and are enclosing the original and two copies of a counter-order and judgment identical in form with that submitted by the plaintiffs with the exception that we have omitted the language to which we object, namely, ". . . together with interest thereon from said date, the Sheriff's poundage fees, . . . "

As you know, under New York law where a judgment debtor is prevented through no fault of his own from paying a judgment, interest on the judgment will not be allowed. *Moscow Fire Insurance Co., etc., et al.* v. *Hecksler & Gottlieb, et al.*, 260 App. Div. 646, 23 N. Y. S. 2d 424, aff'd 285 N. Y. 674. Sanko Kabusiki Kaisya was a Japanese national and was prohibited by the provisions of Executive Order No. 8832 and General Ruling No. 12 of the Treasury Department from paying this judgment without Federal license—which has never been obtained. This Executive Order and General Ruling No. 12 are discussed at length on pages 15-18 of our memorandum in support of our motion for judgment on the pleadings.

We object to the inclusion of the "Sheriff's poundage fees" on the authority of *McCloskey, Sheriff* v. *McGrath*, [fol. 54] *Attorney General, etc.*, 341 U. S. 475. There the Court discussed the Sheriff's claims for his poundage fees in the companion cases of *Zittman* v. *McGrath, Attorney General, etc.*, 341 U. S. 446, and *Zittman* v. *McGrath, Attorney General, etc.*, 341 U. S. 471. The Sheriff had prayed that if the petitioner (the Attorney General) was entitled to possession of the property attached by the Sheriff, any decree to be entered should provide for payment of the Sheriff's statutory poundage fees arising from said attachment. The Court stated (p. 476):

> The precise status of the sheriff's claims under New York law, if they have been settled, is not made clear to us by the record, and, under the circumstances of this case, we cannot presume to say, nor could the District Court, what the New York courts would allow to the sheriff. Nor can we ascertain from the records

> the extent to which his fees have been or may be included in the judgments dealt with in the preceding cases. The record does not disclose that they have been allowed or fixed by the judge who issued the attachment warrants . . . .

This same observation may be made with respect to the Sheriff's poundage fees in the instant case. There is nothing in this record to disclose what poundage fees, if any, have been allowed to the Sheriff by the Supreme Court, New York County, which has exclusive jurisdiction in the matter.

The Supreme Court decided the two *Zittman* cases differently on the basis of the type of vesting order issued by the Attorney General. In the first case reported (341 U. S. [fol. 55] 446), where a right, title and interest vesting order was executed, it held that the Attorney General was not entitled to possession of the attached funds. In the second case reported (341 U. S. 471), where a *res* vesting order was executed, the Court held the Attorney General was entitled to possession of the vested funds and to administer them in accordance with the Trading with the Enemy Act. With respect to both cases, however, the Court decided that the matter of the Sheriff's poundage fees was for the New York state court to determine. It offered a solution to the Sheriff's problem in the following language (p. 478):

> This, however, is without prejudice to the right of the sheriff to have the New York courts determine the state law status of his fees, and, in the case of the attachments of the accounts held by the Chase Bank, to have them, as fixed, included in the judgments or otherwise given the same position as such judgments. And no prejudice is intended to his rights, in the case of the attachments of the accounts held by the Federal Reserve Bank, to present his fee claims, as settled by the New York courts, to the Custodian in the same manner and subject to the same procedures as the judgment creditors in Nos. 299 and 315.

We believe, therefore, that any provison in the instant order and judgment for the payment of "the Sheriff's

poundage fees" which have not been ascertained and fixed by the New York state courts is improper.

[fol. 56] IN UNITED STATES DISTRICT COURT

LETTER TO HON. SIDNEY SUGARMAN DATED AUGUST 2, 1951

(Letterhead of Baer, Marks, Friedman, Berliner & Klein, 20 Exchange Place, New York 5, N. Y.)

August 2, 1951

Hon. Sidney Sugarman, U. S. District Court House, Foley Square, New York, N. Y.

Re: Warner D. Orvis, et al. v. J. Howard McGrath, as Successor to the Alien Property Custodian, et al.

My dear Judge Sugarman:

Under date of July 26, 1951, we addressed a letter to Your Honor in support of our proposed order and judgment in the above entitled matter, and in opposition to the proposed counter order and judgment submitted by defendants which deleted from the third paragraph from the end of the order the phrase, "together with interest thereon from said date, the Sheriff's poundage fees."

Since writing said letter we have been furnished with a photostatic copy of a portion of a letter from the Department of Justice to Irving Saypol, Esq. dated July 24, 1951, in connection with this matter, to which we now wish to reply. We understand that portions of the letter have been excised because of their confidential nature. We do not understand how one party to a litigation can communicate matter to the Court which is confidential insofar as another party is concerned. We address our reply to those portions of the letter furnished to us.

Insofar as the deletion of the phrase "Sheriff's poundage fees" from the proposed order is concerned, we are re-[fol. 57] ferring this matter to Sidney Posner, Esq., Counsel to the Sheriff for consideration. May we point out, however, that the subsequent ordering paragraph (next to last paragraph of the proposed order and judgment) directs

that "payment shall be made by defendant to the Sheriff of the City of New York to be applied by him according to law." It would therefore appear that upon receipt of such funds the Sheriff will deduct his poundage fees, irrespective of whether or not there is direction in the prior paragraph that the same be paid.

The question is whether such payment of poundage shall reduce the recovery of Orvis Brothers & Co., or whether it is an additional sum to be paid by the defendants. The intent of the New York statutes with respect to attachment is that the Sheriff's poundage shall be an additional sum to be recovered from defendants and not a fee to be paid out of the recovery. Carmody in his work on New York Practice states that "Defendant is obliged to pay the Sheriff's fees before he is entitled to the return of the attached property on discharge of the attachment." Vol. VII, p. 653. The fees of the Sheriff are computed in accordance with Civil Practice Act, Section 1558. No judicial proceedings are ordinarily required. It would appear that the defendants should be directed to pay the Sheriff's poundage fees so that the recovery of the plaintiff will not be diminished thereby.

In *Murray Oil Products* v. *Mitsui*, 55 Fed. Supp. 353, aff'd 146 Fed. 381 the Alien Property Custodian paid the fees of the Sheriff. An order providing for such payment was entered on February 21, 1945 on consent of the Alien Property Custodian (Civil Action 18-459, S. D. N. Y.).

Nothing in the *Zittman* case supports defendants' contention that plaintiffs are not entitled to a declaration that [fol. 58] defendants shall pay the poundage due to the Sheriff. The decision in the *Zittman* case was specifically without prejudice to plaintiffs' right to have the fees of the Sheriff included in the judgment. In the *Zittman* case it was the defendants who were to pay said fees, if anyone was to pay them, and in no event could their liability be cast upon plaintiffs. The plaintiffs in the case at bar should not bear this burden.

With respect to the payment of interest, we wish to point out that the affidavit in support of the motion for summary judgment states at page 3 thereof:

> "At the date of the application for said warrant the indebtedness in the account of Takenosuke Itoh with

Orvis Brothers & Co., which indebtedness was guaranteed by C. Itoh & Co., and its successor, Sanko, was in the amount of $19,796.85, with interest from May 1, 1943."

No answering affidavit was filed by defendants, and it is therefore a fact in this case that the indebtedness for which the suit was brought includes interest.

The argument made by defendant, that the judgment debtor having been prevented, without fault of his own, from paying the judgment, requires the disallowance of interest, is a further example of the practice of the Alien Property Custodian of lifting himself by his bootstraps. Because the Alien Property Custodian prevented the judgment from being paid, he feels that he is now free to argue that he is not required to pay interest.

Nothing in the record indicates that the Japanese debtor could object, or did object, to paying interest, and we respectfully submit to Your Honor that the Alien Property [fol. 59] Custodian should not be allowed to stop the running of interest by his own acts. Nothing in *Moscow Fire Insurance Co.* v. *Heckscher & Gottlieb*, 260 App. Div. 646, 23 N. Y. S. (2d) 424, aff'd 285 N. Y. 674 sustains the claim that a liquidator or trustee should be permitted to raise defenses of his own making to the payment of interest. The case of *Moscow Fire Ins. Co. supra*, was distinguished on a similar ground in *Cable & Wireless* v. *Yokahoma Specie Bank* 191 Misc. 567, 79 N. Y. Supp. (2d) 597 in which Mr. Justice Walter stated:

"Counsel for the Superintendent urges that interest is not allowable because payment of plaintiff's claim has been and is prohibited by Executive Order No. 8389 of the President of the United States, 12 U. S. C. A. Sec. 95a note, Code of Fed. Reg., Cum. Supp., tit. 3, p. 645, and he seems to think that that was held in *McCloskey* v. *Brown*, affirmed 271 App. Div. 772, 64 N. Y. S. 2d 925, and *Moscow Fire Ins. Co. of Moscow, Russia* v. *Heckscher & Gottlieb*, 260 App. Div. 646, 23 N. Y. S. 2d 424, affirmed 285 N. Y. 674, 34 N. E. 2d 377, *supra*. There is no opinion or other state-

ment in *McCloskey* v. *Brown, supra,* which enables me to appraise the holding there made, but I think *Moscow Fire Ins. Co. of Moscow, Russia* v. *Heckscher & Gottlieb, supra,* is far from sustaining the Superintendent's position. In that case, payment under a judgment was prevented by an injunction obtained by the United States upon a claim that it was the owner of the fund, payment of which was directed by the judgment, and interest during the time that the injunction was in force was limited to the interest actually earned by the fund during that time. In that case, [fol. 60] therefore, payment was in fact prevented by an injunction obtained by a third person claiming in hostility to both the creditor and the debtor. Here, however, even upon the Superintendent's view that the terms of the Executive Order are such as to include payment of plaintiff's claim among the transactions thereby prohibited in the absence of a license, and even disregarding plaintiff's contention that the licenses issued to the Superintendent on January 14, 1942, and October 29, 1942, constituted such licenses as the Executive Order required, the fact remains that here it was not the Executive Order requirement of a license which did in fact prevent earlier payment of plaintiff's claim. Such payment was not made, not because of the existence of the Executive Order or because of the absence of a license, but because the Superintendent regarded plaintiff's claim as not entitled to payment. Delay in payment here has been caused, not by judicial or executive compulsion, but by the Superintendent's own act, and an act which I hold was wrongful; and I cannot see in that act any reason for refusing plaintiff's claim for interest."

The affidavit in support of the motion establishes that the indebtedness upon which the suit is based arose before the war and was acknowledged by the Japanese debtor on January 10, 1940 (affidavit of F. Howard Smith, p. 2-3). In view of the fact that the indebtedness antedates the war, the decision of Mr. Justice Holmes in *Hicks* v. *Guiness,*

269 U. S. 71 establishes that interest is properly payable. Mr. Justice Holmes stated in the course of that case:

> "The denial of interest for the time covered by the war seems to us wrong. The cause of action had ac- [fol. 61] crued before the war began, *Young* v. *Godbe*, 15 Wall. 562, 21 L. Ed. 250, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions but here again what we regard as principle has prevailed in later days, *Miller* v. *Robertson*, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265; *Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft fur Cartonnagen-Industrie*, (1918) A. C. 239, 245; s. c. (1917) 1 K. B. 842, 850."

Accordingly, we request that our proposed order and judgment be signed in the form submitted.

Very truly yours, Baer, Marks, Friedman, Berliner & Klein, Arthur M. Bullowa.

AMB-mk

cc: Irving H. Saypol, Esq., United States District Attorney, United States Court House, Foley Square, New York, N. Y.

[fol. 62] IN UNITED STATES DISTRICT COURT

LETTER TO HON. SIDNEY SUGARMAN DATED AUGUST 6, 1951

August 6, 1951

Hon. Sidney Sugarman, U. S. District Court House, Foley Square, New York, N. Y.

Re: Warner D. Orvis, et al. v. J. Howard McGrath, as Successor to the Alien Property Custodian, et al.

Dear Judge Sugarman:

Mr. Arthur Bullowa, of Baer, Marks, Friedman, Berliner & Klein, Esqs., attorneys for the plaintiffs, has forwarded to me a copy of their letter of August 2nd addressed to Your Honor concerning the respective proposed orders and judgments submitted by both sides in the above entitled action. The letter states that they are referring to me for my consideration the question of the deletion of the phrase "Sheriff's poundage fees" from the proposed order.

I am in thorough agreement with the views expressed therein in opposition to the deletion of the above phrase. They correctly set forth the long and well-established practice of the Sheriff's Office in collecting poundage in such cases.

After property which has been attached comes into the hands of the Sheriff as a result of a voluntary turnover or because of an action in aid of attachment as in the instant case, the attaching creditor upon obtaining judgment in the main action must issue to the Sheriff an execution against attached property, pursuant to New York Civil Practice [fol. 63] Act, Sections 645 and 969. The Sheriff then must satisfy the judgment out of the attached property.

And, Section 1559 specifically authorizes the Sheriff to collect his poundage fees by virtue of the execution in the same manner as the sum therein directed to be collected. It is therefore apparent that under New York law the Sheriff must collect from the defendant or the person holding defendant's property not only enough to satisfy the plaintiff's judgment but enough to pay the Sheriff's poundage fee, otherwise the plaintiff's judgment cannot be satisfied in whole.

The Sheriff is not required in each instance to go to Court to have his poundage fee fixed and determined. Where there is no dispute that a levy has been made and the amount of the levy or collection is definitely ascertainable, there is no need for judicial determination. It is a relatively simple operation to make the arithmetical computation in accordance with the percentages provided in subd. 7 of Section 1558, namely, 5% on the first $1,000 collected, 2½% on the next $9,000 collected, and 1% on all sums over and above $10,000.

Where the sum of the judgment and interest thereon exceeds the amount of the available attachment proceeds, as it may here, the plaintiff actually bears the expense of the poundage fee. However, where such sum is less than the available attachment proceeds, it is very important to the plaintiff that provision be made for the payment of the poundage fee out of the attachment proceeds over and above the amount due to the plaintiff if he is to be paid in full.

The *McCloskey* and *Zittman* cases (341 U. S. 475, 341 U. S. 446, and 341 U. S. 471), cited in the Department of [fol. 64] Justice letter, in my opinion, are not authority for the exclusion of the "Sheriff's poundage fee" in the instant case. Those cases, unlike the case at bar, did not involve an action in aid of attachment brought jointly by the attachment creditor and the Sheriff. The issues as presented in those cases did not squarely raise the question of the manner in which the Sheriff's fees should be fixed or collected. The Supreme Court in the *McCloskey* case did not deny the Sheriff's claim for poundage on the merits, but, on the contrary, the Court recognized the Sheriff's right to fees and his right to equal treatment with the attachment and judgment creditors, in these clearly unmistakable words:

> "We have no doubt that, in one form or another, the proper fees of the Sheriff should be treated by federal law in the same manner as the attachments and judgments to which they appertain."

The Sheriff's poundage fee was not included in the State Court judgment obtained by plaintiff Orvis herein. In prac-

tice, such fee is never included in the judgment as part of the plaintiff's costs. The Civil Practice Act makes no provision for including poundage as part of the costs and thus as a part of the judgment, undoubtedly because such fees are prospective, problematical, and not readily ascertainable at the time of the entry of judgment. Moreover, as previously pointed out, other provision has been made in Section 1559 for the collection of poundage.

It will be noted that Civil Practice Act, Section 1518, which lists the disbursements which may be included in a bill of costs, does not provide for Sheriff's poundage, but does provide in subd. 8 for "The sheriff's fees for receiving [fol. 65] and returning one execution thereon, including the search for property." This is the small fee which is prescribed in Section 1558, subd. 6 and which the plaintiff is required to pay at the time of the delivery of the execution to the Sheriff.

If no provision is made for poundage in the proposed order and judgment herein, I know of no other way in which plaintiffs Orvis and Sheriff McCloskey can collect from the Custodian sufficient monies out of the attached proceeds to pay the poundage fee. It has been held that the Custodian is immune from suit in the State Courts and that such actions must be brought in the Federal courts (*New York Savings Bank* v. *Markham*, 186 Misc. 595, and cases cited therein).

Very respectfully yours, (sgd) Sidney Posner, Counsel.

pa

cc: Hon. Irving H. Saypol, United States District Attorney, United States Court House, Foley Square, New York, N. Y.

Baer, Marks, Friedman, Berliner & Klein, Esqs., Attorneys for plaintiffs, 20 Exchange Place, New York 5, N. Y.

[fol. 66] IN UNITED STATES DISTRICT COURT

MEMORANDUM ENDORSED BY HON. SIDNEY SUGARMAN, DISTRICT JUDGE, ON PROPOSED ORDER AND JUDGMENT

August 10, 1951

Although interest is allowable under in re People by Beha etc. 253 New York 365, I decline to sign this judgment until proof of compliance with 50 U. S. C. App. §20 is furnished.

Sidney Sugarman, U. S. D. J.

IN UNITED STATES DISTRICT COURT

DECISION ENDORSED BY HON. SIDNEY SUGARMAN ON DEFENDANTS' NOTICE OF MOTION FOR JUDGMENT ON PLEADINGS

"July 10, 1951

Motion Denied.

See *Zittman* v. *McGrath*, 341 U. S. 446.

Sidney Sugarman, U. S. D. J."

IN UNITED STATES DISTRICT COURT

DECISION ENDORSED BY HON. SIDNEY SUGARMAN ON PLAINTIFFS' NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

"July 10, 1951

Motion Granted.

See *Zittman* v. *McGrath*, 341 U. S. 446.

Sidney Sugarman, U. S. D. J."

[fol. 67] IN UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT APPEALED FROM—Oct. 31, 1951

Civil Action # 50-68

Defendants having moved this court by notice of motion returnable on June 15, 1951, for an order directing the

entry of judgment on the pleadings on the ground that there are no issues as to any material fact and that defendants are entitled to judgment as a matter of law, and plaintiffs having made a cross-motion for summary judgment for the relief requested in the supplemental complaint pursuant to Rule 56 of the Rules of Civil Procedure and said motions having regularly come on to be heard,

Now, on reading and filing defendant's notice of motion returnable on June 15, 1951, plaintiffs' notice of cross motion dated June 4, 1951, the affidavit of F. Howard Smith, sworn to June 6, 1951, the supplemental complaint, and the answer, and after hearing Irving H. Saypol, U. S. Attorney (Leon Yudkin, Esq. of Counsel) in support of defendant's motion for judgment on the pleadings and in opposition to plaintiffs' motion for summary judgment and Baer, Marks, Friedman, Berliner & Klein, (Arthur M. Bullowa, Esq. of counsel) in opposition to defendants' motion for judgment on the pleadings and in support of plaintiffs' motion for summary judment, and due deliberation having been had, and the memorandum decisions of the court having been endorsed upon the respective motion papers, [fol. 68] Now, on motion of Baer, Marks, Friedman, Berliner & Klein attorneys for plaintiffs, it is

Ordered that defendants' motion for judgment on the pleadings be and the same is hereby denied, and it is further

Ordered that plaintiffs' motion for summary judgment be and the same is hereby granted, and it is further

Ordered, adjudged and decreed that plaintiffs on June 28, 1943 by virtue of a levy made under a warrant of attachment, acquired a lien upon the entire indebtedness of Anderson, Clayton & Co. to Sanko Kabusiki Kaisya prior and superior to that of the Alien Property Custodian and his successors in interest, and it is further

Ordered, adjudged and decreed that the Alien Property Custodian and his successors hold the sum of $29,633.24 described in Vesting Orders 9282 and 10253 subject and subordinate to the interest acquired by plaintiffs by virtue of said attachment lien, and it is further

Ordered, adjudged and decreed that Vesting Orders 9282 and 10253 are valid and effective only to the extent of any

surplus of the property so vested, after application thereof to the extent of plaintiffs' lien thereon in satisfaction thereof, and it is further

Ordered, adjudged and decreed that said attachment lien entitles plaintiffs to receive payment of the moneys received by defendants pursuant to Vesting Orders 9282 and 10253 to the extent necessary to satisfy said lien, and it is further

[fol. 69] Ordered, adjudged and decreed that the judgment entered in the office of the Clerk of the County of New York on December 3, 1943, in favor of Orvis Brothers & Co. and against Sanko Kabusiki Kaisya in the sum of $20,714.84 together with interest thereon from said date, the Sheriff's poundage fees, and costs of $35.50 shall be paid by defendants out of the sum of $29,633.24 received by defendants pursuant to Vesting Orders 9282 and 10253, and it is further

Ordered, adjudged and decreed that such payment shall be made by defendants to the Sheriff of the City of New York to be applied by him according to law, and it is further

Ordered, adjudged and decreed that such payment shall be made by defendants without prejudice to plaintiff's rights with respect to the balance, if any, of plaintiffs' claim remaining unsatisfied.

Dated: October 31, 1951.

Sidney Sugarman, U. S. D. J.

Judgment entered: William V. Connell, Clerk, Nov. 1, 1951.

[fol. 70] In United States District Court

Notice of Appeal—Filed December 17, 1951

Sirs:

Notice is hereby given that J. Howard McGrath, Attorney General of the United States, as Successor to the Alien Property Custodian, defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order and judgment of the United States District Court for the Southern District of New

York, dated October 31, 1951, and entered herein on November 1, 1951, which denied the defendants' motion for judgment on the pleadings and which granted the plaintiffs' motion for summary judgment, and from each and every part thereof.

Yours, etc., Myles J. Lane, United States Attorney for the Southern District of New York, Attorney for the Defendants, Office & P. O. Address: United States Court House, Foley Square, New York 7, New York.

[fols. 71-74] Stipulation Designating Contents of Record on Appeal (omitted in printing)

[fol. 75] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 76] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 256

Argued June 4, 1952 Decided June 30, 1952

Docket No. 22340

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, Harold A. Rousselot, Henry H. Balfour, J. Antonio Zalduono, William G. Wigton, Clifford J. Doerle, and Herbert R. Johnson, doing business under the firm name and style of Orvis Brothers & Co., and John J. McCloskey, Jr., as City Sheriff of the City of New York, Plaintiff-Appellees,

v.

J. HOWARD MCGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, Defendant-Appellant

Before: Augustus N. Hand, Clark and Frank, Circuit Judges

Appeal from a judgment of the United States District Court for the Southern District of New York. Reversed.

[fol. 77] Baer, Marks, Friedman, Berliner & Klein (Donald Marks and Arthur M. Bullowa, of counsel) for appellees.

Harold L. Baynton, Assistant Attorney General, Myles J. Lane, United States Attorney for the Southern District of New York, and James D. Hill, George B. Searls and Westley W. Silvian, of counsel, for appellant.

Joseph M. Cohen, for Leo Zittman, Amicus Curiae.

Debts owing to Japanese Nationals were blocked by Executive Order No. 8389, effective as to Japan on June 14, 1941 (6 F. R. 3715), promulgated pursuant to the Trading With the Enemy Act, 50 U. S. C. App. § 5 (b). General Ruling No. 12, issued April 21, 1942 by the Treasury, stated that any unlicensed transfer of property in a blocked account was null and void, and defined "transfer" to include

an attachment. Paragraph 4 of that Ruling said that, although an attachment might be valid between the debtor and the attaching creditor, it could not confer a greater interest in the property "than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

In 1943, plaintiffs obtained a lien, by levy under an attachment warrant issued in a suit plaintiffs brought in a New York State court, on the account owing by Anderson, Clayton & Company, an American corporation, to plaintiffs' debtor, a Japanese National. In Plaintiffs' attachment suit, judgment was entered in favor of plaintiffs in October 1946, with an amendment, in February 1948, increasing the amount recoverable because of the discovery of an additional indebtedness. Plaintiffs' application to the Attorney [fol. 78] General for a license to permit payment to them by Anderson, Clayton & Company, was denied in February 1947 and again in February 1949. On June 27, 1947, and on successive dates in 1947-1948, the Attorney General, by res vesting orders, took over the debts owed the Japanese National by Anderson, Clayton & Company. The plaintiffs filed notice of claim under § 9(a) of the Trading With the Enemy Act. The claim was dismissed by the hearing examiner as not within that section's application. Plaintiffs brought the present suit under § 9(a) of the Trading With the Enemy Act. After filing answer, the defendant moved for judgment on the pleading, and plaintiffs cross-moved for summary judgment in their favor. The district court denied defendant's motion and granted plaintiffs' motion for summary judgment.

FRANK, Circuit Judge:

1. The Custodian argues that the court below had no jurisdiction of this suit because of § 34(f) which provides for judicial review in the District of Columbia exclusively. But § 34(i) says that no person asserting "any interest, right, or title" in property acquired by the Custodian shall be barred from proceeding for its returns pursuant to the Act by reason of any proceeding he may have brought pursuant to § 34. Accordingly, if the plaintiff had an "interest, right or title," he could properly maintain his suit in the court below, pursuant to § 9(a). The question, then, is whether the attachment created has such an "interest, right

or title," *i.e.*, a lien conferring priority over other creditors, although the Custodian took control under a res vesting order.

2. The trial judge apparently thought the answer self-evident. He said merely: "Motion denied. See Zittman v. [fol. 79] McGrath, 341 U. S. 446." We think, however, that a reading of that Supreme Court opinion (which we shall call Zittman No. 1) and of its companion, 341 U. S. 471 (which we shall call Zittman No. 2), discloses that this question the Supreme Court deliberately left undecided.[1]

3. Undoubtedly, Congress has the power to authorize the nullification of all attachment liens obtained after a freezing order (on the analogy of the effect of bankruptcy on preferences). We must enquire whether Congress gave such authority.

As noted in Zittman No. 2, § 34(a) provides that property "vested" in the Custodian "shall be *equitably applied* by the Custodian * * * to the payment" of the alien debtor's debts.[2] Section 34(d) says that payments shall be pro rata if the available money is "insufficient for the satisfaction of all claims allowed by the Custodian." Section 34(g) establishes an order of priority of claims, but accords no priority to attachment liens over ordinary claims. In Zittman No. 2, the Court stated that, under a res vesting order, the Custodian "takes over the estate for administration," as a "liquidation measure for the protection of American creditors."[3] The words "equitable," "administration" and "liquidation" reinforce the idea of equality and suggest repugnance to the notion that the race should be to the swift among the creditors. The absence of any provision according priority to attachment liens indicates [fol. 80] an intention to deprive them of any preferential

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[1] Zittman No. 1 held merely that an attachment here can be a valid lien as between (a) the attaching creditor and (b) either the enemy debtor or the Custodian if he chooses —by a "right, title and interest" order—to step into the debtor's shoes. Zittman No. 2 held that a res vesting order does not "work any automatic" destruction of an unlicensed attachment lien.

[2] 341 U. S. at 474. Emphasis added.

[3] 341 U. S. at 474-475.

position. Moreover, since in some states an attachment does not create a lien, the granting of such preferences will result in a lack of uniformity in an area which is peculiarly of national concern. Justices Reed and Burton apparently reached a conclusion adverse to the contention made by the plaintiffs in the instant case.[4]

On the other hand, Douglas, J., said he could "find nothing in the Act which warrants leveling the good faith lien claimant to the unsecured status of the others," adding (in a note): "The priority of debt claims in § 34(g), 60 Stat. 925, 928, does not purport to deal with creditors preferred by reason of a lien lawfully acquired in judicial proceedings."[5] However, that brings up this question: Does a lien procured in an "unlicensed" attachment suit give rise to a lien acquired "lawfully" as against the Custodian when he makes a res vesting order? The answer, we think, turns on the meaning and validity of Treasury Ruling No. 12, 7 F. R. 2291.

That Ruling purported to be issued pursuant to the freezing order, Executive Order No. 8389 (as amended). The Ruling, effective on April 21, 1942—and thus antedating the attachment suit here—provided that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void, and defined "transfer" to include the issuance or levy of any attachment; paragraph 4 added that no attachment could confer a great interest in property "than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license," although it would be valid as between the parties for the purpose of [fol. 81] determining the rights or liabilities litigated. We think that, if valid, this Ruling deprives an unlicensed attachment lien of any preferential position in the event of a res vesting order. We think further that this Ruling was within the scope of the Executive Order, and that both that Order and the Ruling were authorized by § 5 (b) of the Act. Cf. *Clark* v. *Propper*, 169 F. (2d) 324, 327 (C. A. 2); *Propper* v. *Clark*, 337 U. S. 472.

Reversed.

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[4] See 341 U. S. at 465 *et seq.* They relied, in part, on *Propper* v. *Clark*, 337 U. S. 472.

[5] 341 U. S. at 464, 465.

[fol. 82] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of June one thousand nine hundred and fifty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

WARNER D. ORVIS, et al., Plaintiff-Appellees,

v.

J. HOWARD MCGRATH, etc., Defendant-Appellant

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 83] [Endorsed:] United States Court of Appeals for the Second Circuit. Warner D. Orvis, et al., v. J. Howard McGrath, etc. 256. Judgment. United States Court of Appeals, Second Circuit. Filed June 30, 1952. Alexander M. Bell, Clerk.

[fols. 81-86] Petition for Rehearing covering 6 pages filed July 14, 1952 omitted from this print. It was denied, and nothing more by Order July 29, 1952.

[fol. 90] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WARNER D. ORVIS, et al., Plaintiffs-Appellees,

against

J. HOWARD MCGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, Defendant-Appellant

Before: Augustus N. Hand, Clark and Frank, Circuit Judges

ON PETITION FOR REHEARING

Baer, Marks, Friedman, Berliner & Klein, Attorneys for Plaintiffs-Appellees.

Per Curiam: Petition denied.

Augustus N. Hand, Charles E. Clark, Jerome N. Frank, C. JJ.

Filed July 29, 1952.

[fol. 91] [Endorsed:] United States Court of Appeals, Second Circuit. Filed July 29, 1952. Alexander M. Bell, Clerk.

[fol. 92] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of July, one thousand nine hundred and fifty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

WARNER D. ORVIS, et al., Plaintiffs-Appellees,

v.

J. HOWARD MCGRATH, Attorney General, etc., Defendant-Appellant

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 93] [Endorsed:] United States Court of Appeals, Second Circuit. Warner D. Orvis, et al., v. J. Howard McGrath, etc. Order. United States Court of Appeals, Second Circuit. Filed July 29, 1952. Alexander M. Bell, Clerk.

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] SUPREME COURT OF THE UNITED STATES

No. 404, October Term, 1952

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 15, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.